IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1123~~ 60

FEDERAL POWER COMMISSION, *Petitioner*

v.

SUNRAY DX OIL COMPANY, ET AL.

No. [illegible] 61

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*

v.

SUNRAY DX OIL COMPANY, ET AL.

No. [illegible] 62

THE BROOKLYN UNION GAS COMPANY, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR SUN OIL COMPANY, RESPONDENT IN OPPOSITION

[illegible] D. [illegible]
1608 Walnut Street
Philadelphia, Pennsylvania 19103

Robert E. May
Francis H. [illegible]
1700 K Street, N.W.
Washington, D.C. 20006

Attorneys for Sun Oil Company, Respondent

April [illegible], 1967

[illegible]

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (FPC Pet., App. pp. 15-48) is reported at 370 F. 2d 181. The opinions of the Commission (J.A. 354-396, 409-418)[1] are reported at 31 FPC 623 and 1315.

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1 "J.A." references herein are to the joint appendix in the court of appeals, copies of which have been deposited with this Court by Petitioner in No. 1133.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1966 (FPC Pet., App. p. 83). The petitions for writs of certiorari were filed on March 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission had the power to impose refund liabilities retroactively upon amounts collected pursuant to lawful temporary certificate orders, which authorized certain sales of natural gas but contained no forewarning of the possibility of such imposition.

2. Whether the Federal Power Commission's assertion of such power at the time of permanent certification of these sales constituted an illegal contravention of its order in the proceeding below holding that a refund imposition "would be contrary to the public interest, as well as inequitable."

3. Whether there is substantial evidence to support the Federal Power Commission's determination of the "in-line" price, which it attached as a condition to permanent certification of the sales of natural gas involved.

STATUTE AND REGULATIONS

The pertinent provisions of the Natural Gas Act are set forth in the Commission's petition (FPC Pet., pp. 2-3). The Commission's Statement of General Policy No. 61-1 (24 FPC 818), and the Fifth Amendment thereto (28 FPC 441) are set forth in Appendix A, *infra*, pp. 1a-15a.

STATEMENT

The administrative proceedings below were initiated by the filing of separate applications for certificates of public convenience and necessity by Respondents[2] and others pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f. These applications proposed sales of natural gas produced in Texas Railroad Commission District No. 4 to various pipeline companies pursuant to individual contracts providing for initial prices ranging from 16 to 18 cents per Mcf. Each of these applications included the related gas sales contract which fully disclosed the terms upon which the gas was proposed to be sold.

Following the initiation of these administrative proceedings, the Commission granted temporary certificates of public convenience and necessity by separate orders[3] authorizing the producer Respondents to make

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[2] These included the applications of Sunray DX Oil Company, Sohio Petroleum Company, Texaco Inc., Gulf Oil Corporation, Sun Oil Company, Edwin L. Cox, Lamar Hunt, Humble Oil & Refining Company and Union Producing Company, Respondents here.

[3] These orders and the related certificate applications were made available by the Commission to all interested parties in its Public Reference Room (J.A. 276). Counsel for Sun Oil Company has been informed by the Office of Public Information of the Commission that since early 1960 copies of all temporary certificates issued have been placed in a special book in the Commission's Public Reference Room for easy access by the public. This is supplementary to the Commission's Rules of Practice and Procedure providing for public access to all filings and Commission orders relating to such filings [18 CFR 1.36(c)].

The United Gas Improvement Company's equivocal contention that the Commission did not make copies of its temporary certificate orders available in its Public Reference Room until sometime after August 30, 1962 appears to be factually erroneous and is contrary to the record below (Pet. No. 1134, p. 9).

each of the proposed sales at the initial contract prices. Certain of these certificate authorizations expressly provided for the possibility of later refunds in stated circumstances (J.A. 283-284). However, the temporary certificate orders placed in issue by Petitioners did not contain any such refund condition or any forewarning that the prices authorized would be subject to a retroactive refund imposition by the Commission at a later date (J.A. 190-191, 381).

Thereafter, distributor Petitioners [4] filed a joint motion, in the nature of an application for rehearing of the Commission's orders granting the unconditioned temporary certificates, seeking the imposition of refund conditions. The Commission, after careful consideration and on the basis of detailed findings, denied this motion by its order of February 5, 1963 (J.A. 275-282; Appendix B, *infra*, pp. 16a-24a).

Following hearings upon the applications for permanent certificates, the Commission issued its decision below on March 23, 1964 (*Amerada Petroleum Corp.*, 31 FPC 623; J.A. 354-396), in which it determined an "in-line" price of 16 cents per Mcf for the period in question based upon the evidence admitted. In its decision the Commission also asserted the power, in disregard of its order of February 5, 1963, to require the refund of such amounts collected in reliance upon the temporary certificates as were higher than the subsequently determined "in-line" price of 16 cents.

Upon judicial review of the Commission's decision, the court below affirmed the 16 cent "in-line" price de-

[4] The United Gas Improvement Company, Petitioner in No. 1134; Long Island Lighting Company and Philadelphia Electric Company, Petitioners in No. 1135.

termination because it was supported by substantial evidence (370 F. 2d at 188-191; FPC Pet., App. pp. 25-31). However, it held that the Commission lacked the power to require the refund of amounts collected in reliance upon the temporary certificates in the particular circumstances involved (370 F. 2d at 192-194; FPC Pet., App. pp. 34-39).[5]

ARGUMENT

Refund Issue

The court below held that the Commission lacked the power to require the refund of amounts collected by Respondents pursuant to lawful certificate authorizations granted by the Commission. The amounts in question were collected in reliance upon temporary certificate orders which contained no forewarning that refunds might ultimately be ordered. While Petitioners have deliberately neglected to mention it, the Commission made absolutely clear by its order of February 5, 1963 that the temporary certificates it had issued were firm authorizations which would not be modified retroactively. All of these orders became final before the Commission asserted the power to unsettle them in Opinion No. 422. In these circumstances, the court below properly held that the Commission could not require refunds.

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[5] In the decision below the court noted that the Commission had actually ordered the producer certificate applicants to refund by its subsequently-issued Opinion No. 501 (Pet. No. 1133, App. p. 32). On March 27, 1967 the court below set aside this latter opinion by a *per curiam* order on the sole basis of its disposition of the refund issue challenged here. *Standard Oil Company of Texas* v. *Federal Power Commission,* No. 9289, — F. 2d —.

Petitioners, however, contend that this holding of the court below should be reviewed because it (1) conflicts with this Court's *Callery* decision;[6] (2) conflicts with the District of Columbia Circuit's *Skelly* decision;[7] and (3) presents an important question under the Natural Gas Act. These asserted grounds are in error and fail to demonstrate sufficient cause for granting review of the decision below on the refund issue.

1. In *Callery,* this Court held that the Commission could require the refund of certain amounts collected pursuant to certificate orders which had never become final and had been set aside on judicial review. There, the certificate holders were on notice of the possible invalidation of their certificates which ultimately occurred. In its Petition, the Commission now contends, contrary to fact, that there was no "explicit warning in *Callery*" of the possibility of refunds (FPC Pet., p. 12). This Court, however, observed in *Callery* that the Commission had given explicit notice to the producers involved that it would require refund of amounts collected under the invalidated certificates (382 U.S. at 226).

The case-at-bar presents a distinctly different situation from that in *Callery.* Here, temporary certificate orders containing no refund conditions were lawfully issued to producer Respondents pursuant to Section 7 of the Natural Gas Act and the Commission's

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[6] *United Gas Improvement Co., et al.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965).

[7] *Public Serv. Comm. of New York* v. *Federal Power Commission,* 329 F. 2d 242 (1964), *cert. den. sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963.

valid rules thereunder, *Federal Power Commission* v. *H. L. Hunt, et al.,* 376 U.S. 515, 520 (1964); *P.S.C. of N.Y.* v. *Federal Power Commission,* 327 F. 2d 893, 896 (D.C. Cir. 1964). In reliance upon these certificates, which became final as a matter of law,[8] the producers commenced deliveries at authorized initial prices which were maintained during the entire period of the temporary certificates, *Federal Power Commission* v. *H. L. Hunt, et al., supra.*

Of crucial importance, the Commission held by its order of February 5, 1963 that the initial prices it had authorized were not subject to refund and would continue to be collected "until a prospective price could be determined after hearing" (J.A. 275; App. B, *infra,* p. 16a).

In *Callery,* the certificate holders were specifically forewarned of the possibility of refunds. By contrast, the parties here were explicitly told by the Commission that refunds would not be ordered:

> "* * * Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the

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[8] *Texaco Inc.* v. *Federal Power Commission,* 290 F. 2d 149 (5th Cir. 1961). In that case, the Fifth Circuit dismissed producer attacks upon temporary certificates as untimely when made on review of subsequently-issued permanent certificates. The Fifth Circuit held that temporary certificate orders are final orders which must be reviewed within the time provided by the Natural Gas Act.

most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon [the producers'] part.' *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy" (J.A. 277; App. B, *infra*, pp. 18a-19a).

The Commission's order of February 5, 1963 was clearly reviewable. However, no review was sought. In the circumstances, this order became binding upon all Petitioners here, including the Commission itself. *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F. 2d 999, 1004 (D.C. Cir. 1963).

This Court explained in *Callery* the limited basis upon which it upheld the Commission's imposition of refund liabilities in that case, as follows:

> "* * * While the Commission 'has no power to make reparation orders,' *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618, its power to fix rates under § 5 being prospective only, *Atlantic Refining Co.* v. *Public Service Comm'n*, *supra*, 360 U.S. at 389, it is not so restricted where its order, which never became final, has been overturned by a reviewing court * * *" (382 U.S. at 229).

Notwithstanding these limitations, Petitioners are here seeking the reparation of monies collected pursuant to and in reliance upon orders which became final and were never overturned by a reviewing court.[9]

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[9] Petitioners' contentions that the Commission has the power to undo conclusively valid orders by retroactive modification is not only erroneous, but would make reliance upon any agency's order wholly unjustified.

2. Petitioners also contend that the decision of the court below and the decision of the District of Columbia Circuit in *Skelly, supra,* are in conflict. In *Skelly,* the District of Columbia Circuit concluded that the Commission had the discretionary power to order refunds because the Commission had issued the temporary certificates in question without mature consideration (329 F. 2d at 249). In this case, as the court below found, the Commission, after mature consideration, refused to impose refund conditions upon the temporary certificates which it had issued (FPC Pet., App. pp. 34-35).[10]

Moreover, the temporary certificates in *Skelly* involved sales under contracts executed prior to the Commission's promulgation of its *Statement of General Policy No. 61-1,* issued September 28, 1960 (24 FPC

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[10] Petitioners ignore the language of the Commission's February 5th order stating that the prices which had been authorized were not subject to refund and would continue to be collected until a prospective price could be determined. They erroneously contend that these initial prices were "provisional" and subject to retroactive modification (FPC Pet., p. 11; see also, Pet. No. 1135, p. 22). They largely rely on certain routine language contained in these temporary certificate orders, to the effect that the particular authorization is granted without prejudice to future action by the Commission (J.A. 190). Virtually identical routine language appears in the permanent certificates issued in the administrative proceeding below (J.A. 387). It cannot reasonably be maintained that such language rendered the temporary rates "provisional" any more than identical language rendered the permanent rates "provisional." As the court below found, the obvious intent of such language in temporary certificates, was to indicate that the Commission was not binding itself to issue an identical permanent certificate of prospective effect (FPC Pet., App. pp. 37-38).

818; App. A, *infra* pp. 1a-6a).[11] This Policy Statement established an initial price standard of 18 cents per Mcf for new sales in Texas Railroad Commission District No. 4. Each of the new sales involved herein was temporarily certificated at 18 cents or less in conformity with the Policy Statement. The Policy Statement put all interested parties on notice that it would be implemented.[12] Indeed, the temporary certificates involved here were just such an implementation, *J. M. Huber Corporation* v. *Federal Power Commission,* 294 F. 2d 568, 570 (3rd Cir. 1961). As the Commission observed in its order of February 5, 1963 herein, the price levels established by the Policy Statement were designed to enable producers to obtain authorizations which would provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas (App. B, *infra,* p. 19a). Petitioners' contention that interested parties were prejudiced by lack of notice that the Commission would implement its Policy Statement by issuing temporary certificates is highly misleading. It is clear that this implementation of the Commission's Policy Statement was judicially reviewable, *Federal Power Commission* v. *H. L. Hunt et al., supra.* Furthermore, there can be no question that distributor-Petitioners, as evidenced by their

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[11] This Policy Statement was issued simultaneously with the Commission's decision in *Phillips Petroleum Company,* 24 FPC 537, 547 (1960), affirmed, *sub nom. Wisconsin* v. *F.P.C.,* 303 F. 2d 380 (D.C. Cir. 1963), affirmed, 373 U.S. 294 (1963). It was published in the *Federal Register* on October 5, 1960 (25 F.R. 9578).

[12] In its Policy Statement, the Commission explained the significance of the 18 cent price standard established for District No. 4 "as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition" (24 FPC 818; App. A, *infra,* p. 1a).

own actions below, had actual notice of the temporary certificates involved here and were afforded full opportunity to contest the propriety of these certificates.

3. In an effort to secure this Court's review of the decision below on the refund issue, the Petitioners also claim that it presents an important question in the administration of the Natural Gas Act. In support, Petitioners cite *extra*-record calculations of refunds which may be required in a number of *other* cases. The Commission contends that those other cases involve temporary certificates which the Commission issued without express refund conditions (Pet. No. 1133, pp. 8-9). The situation in this case is not that the Commission simply failed to impose express refund conditions. Rather, the Commission here affirmatively declared that refunds would not be ordered. Thus, the broad question posed by the Petitioners on the refund issue is not present in this case. Accordingly, the claimed importance of review in this case has not been demonstrated.

The Price Line Question

Distributor Petitioners[13] ask this Court to review the decision of the court below affirming the Commission's 16.0 cent price line determination. As the court below noted, the question there was whether substantial evidence supported the Commission's conclusion (Pet. No. 1133, App. A, p. 25). The same question is presented here. Petitioners in No. 1135 allege a conflict on the price line issue between the decision below and the District of Columbia Circuit's decision in

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[13] The Brooklyn Union Gas Company, Long Island Lighting Company, Philadelphia Electric Company, and Public Service Commission of the State of New York (Joint Pet. No. 1135) and The United Gas Improvement Company (Pet. No. 1134).

Public Service Com. of New York v. *Federal Power Commission*, . . . F. 2d . . . (decided February 7, 1967), but ignore the fact that the District of Columbia Circuit expressly recognized the lack of conflict between its decision and the decision below (Pet. No. 1135, App. pp. 27a-28a).

To put the substantial evidence issue here in proper perspective, it is necessary to consider the context in which this case arose, the Presiding Examiner's initial decision, and the Commission's opinion setting the 16.0 cent line.

On September 28, 1960 the Commission issued its Statement of General Policy entitled *Establishment of Price Standards to be Applied in Determining the Acceptability of Initial Price Proposals and Increased Rate Filings by Independent Producers of Natural Gas.* This Policy Statement promulgated standards for the guidance of the Commission and all interested parties in determining "whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended." On the basis of extensive cost, economic and price information available, the Commission established price schedules for 21 separate natural gas producing areas, including Texas Railroad Commission District No. 4. The initial rate standard fixed by the Policy Statement for that area was 18.0 cents per Mcf which was maintained for nearly two years as the initial rate standard for sales of natural gas in Texas District No. 4 (App. A, *infra*, p. 6a).[14] It was

[14] On August 30, 1962 the Commission amended its Policy Statement by providing an initial rate of 16.0 cents per Mcf for that area, *Fifth Amendment to Statement of General Policy No. 61-1*, 28 FPC 441 (App. A, *infra*, pp. 7a-8a).

during this two-year period that the contracts at issue in this case were executed.

On August 30, 1962 the Commission issued its Opinion No. 362 in *Skelly Oil Company,* 28 FPC 401.[15] There the Commission established a Texas District No. 4 price line of 15.0 cents per Mcf for the time period under consideration, but held that additional evidence was needed to fix a price line for contracts executed after the issuance of the Policy Statement (28 FPC at 412).

In this context, the administrative proceedings below were set for hearing by order of August 30, 1962 (J.A. 197-202). The Commission undertook to consolidate for hearing all pending producer certificate applications seeking authorization to make sales of natural gas in Texas District No. 4.

Thereafter, the hearing before the Commission's Presiding Examiner commenced. Pursuant to motions to strike filed by the distributor Petitioners here, as well as the Commission Staff, the Presiding Examiner rejected all cost, supply-demand and economic trend presentations (J.A. 18-130) which the certificate applicants had offered in support of their initial contract prices. The Examiner's reasoning was that while such presentations would be appropriate in proceedings under Sections 4 and 5 of the Natural Gas Act, they were not relevant in a producer certificate case under Section 7, where there was only an in-line price issue (J.A. 234-260). With the scope of the proceeding thus defined, the Examiner received the testimony and

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[15] Affirmed in part, *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 242 (D.C. Cir. 1964), *cert. denied, sub nom. Prado Oil and Gas Co.* v. *Federal Power Commission,* 377 U.S. 963.

related price line Exhibit No. 16 prepared by a witness for the Commission Staff (J.A. 163-188).[16] Pursuant to contentions urged by distributor Petitioners here, the Examiner found that the relevant period for making the price line determination was September 28, 1960 through August 31, 1962. On the basis of 14 contracts[17] executed during that period, which the Commission had permanently certificated, the Examiner reached a 15 cent price line conclusion (J.A. 335).

On review of the Examiner's decision the Commission issued Opinion No. 422, and upheld the price line period fixed by the Examiner[18] but found that his 15 cent line was wholly inappropriate. In so holding, the Commission relied upon the Ninth Circuit's *U.G.I.* decision[19] that "the price line is intended to reflect current conditions in the industry", and accordingly must be based on "prices under which a substantial amount of natural gas presently moves in interstate commerce" (283 F. 2d at 824). The Commission found that the few permanently certificated sales used by the Examiner amounted to only 1.39 percent of the

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[16] The Examiner also received testimony showing that the 18.0 cent Policy Statement price standard had a substantive impact on contract negotiations and that the producer certificate applicants had relied on that policy standard (J.A. 131-135, 142-155).

[17] Staff's price line exhibit listed more than 290 contracts.

[18] The distributor Petitioners do not contest the propriety of the time period under consideration, which was based on their contentions before the Examiner (J.A. 335).

[19] *United Gas Improvement Company* v. *Federal Power Commission*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879.

gas volumes shown in Staff price line exhibit (J.A. 371).[20] In these circumstances, the Commission held that the Examiner's price line determination was not based on a substantial amount of natural gas moving in interstate commerce. The Commission held that it:

> "* * * would be manifestly improper to base an 'in-line' price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets" (J.A. 372).

The Commission then found that "unlike any previous 'in-line' determination" it had made, the record in this case contained neither a substantial number of relevant permanently-certificated sales[21] nor evidence of substantial volumes moving under permanent certificates (J.A. 370). In these circumstances, the Commission held that it was proper to give some evidentiary weight to the sales which it had temporarily certificated, noting, however, that permanent certificates for

[20] The Commission pointed out that two of the five sales proposed by Sun Oil Company alone involved "nearly twice the monthly volumes" of the permanently certificated sales considered by the Examiner (J.A. 371). The record shows that the certificate applications in this case involved approximately 2,635,000 Mcf per month (J.A. 322) while the sales used by the Examiner in reaching his price line conclusion involved only 356,000 Mcf per month (J.A. 335).

[21] The Commission noted that it was not by chance that so few permanent certificates were granted during the two-year period in question because all contracts proposing a price higher than 15.0 cents had been opposed by the distributor Petitioners. The Commission ruled that the few sales considered by the Examiner could not control the price line applicable to sales which involved "over seven times" the volumes which had been permanently certificated (J.A. 370-371).

price line purposes were "decidedly more persuasive" (J.A. 370).

On the basis of both the permanently and the temporarily certificated contracts analyzed in Staff's price line exhibit, the Commission made numerous findings of fact. The Commission found that 71 percent of the gas in the area during the time period involved was sold at a price of 17 cents or more while 82 percent of the gas was sold at a price of 16 cents or more. The Commission further found that the weighted average price during the period was approximately 17.2 cents per Mcf (J.A. 373-374). While these findings admittedly pointed "in the direction of a higher price" (J.A. 379), the Commission determined an "in-line" price of 16.0 cents per Mcf for the period in question.[22]

The Commission observed as follows:

> "* * * Our decision herein draws the line substantially below the average going price for gas in the area and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed. The 16 cent determination herein thus not only preserves, but actually rolls back, the initially considered price line for the period in issue" (J.A. 379).

In addition to its evaluation of Staff's price line evidence, the Commission also concluded that "some measure of weight" had to be accorded the 18.0 cent price standard established in its General Policy. In this respect, the Commission reviewed the testimony

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[22] The Commission found from Staff's price line exhibit that 16 cents was "the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question" (J.A. 379).

in the record offered by the producers (e.g., J.A. 131-135) showing that the Policy Statement had a substantial influence upon contract negotiations during the two-year period under consideration (J.A. 376-378).

Distributor Petitioners contend that the Commission erred in considering sales under temporary certificates in making its price line determination. This contention is defective because it ignores the Commission's explicit findings, which distributor Petitioners do not contest, that the few sales which had been permanently certificated during the pricing period in question were "isolated and inherently nonrepresentative" and did not involve a substantial amount of natural gas moving in interstate commerce. In these circumstances it was only reasonable that the Commission give some weight to sales under temporary certificates, when in absence of that consideration, there would have been insufficient basis for finding a price line for the period in question.

Distributor Petitioners also claim that the Commission's consideration of its own Policy Statement constituted error. This contention is highly misleading because, as its Opinion makes clear, the Commission did not merely consider the Policy Statement and nothing more, but weighed extensive testimony in the record offered by the producer certificate applicants showing the *effect* of the Policy Statement in the world of gas sales contract negotiations (*e.g.,* J.A. 131-134). This evidence was properly offered and admitted without objection, and there can be no claim of error in the Commission's consideration of it.

The question, therefore, is whether the evidence which the Commission considered was substantial.[23] While the evidence pointed in the direction of a higher price line, there is substantial evidence to support the Commission's 16-cent price line determination, *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 (1966); *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company,* ... U.S. ..., 87 S. Ct. 255 (1966).

Distributor Petitioners also contend that a conflict exists between the decision below and the District of Columbia Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission,* ... F. 2d ... (decided February 7, 1967). That case involved review of Commission Opinions fixing "in-line" prices for Texas Railroad Commission District Nos. 2 and 3, respectively. The Commission has historically treated each of those areas as separate and distinct from Texas District No. 4 for "in-line" pricing. This is demonstrated by the separate delineation of these three pricing areas by the Commission in its Statement of General Policy No. 61-1, and amendments thereto (App. A, *infra* pp. 6a, 8a). Indeed, the Commission once considered the possibility of consolidating these three Districts as a single "in-line" pricing area but decided against it, 30 FPC 1374 (1963). Thus, distributor Petitioners' discussion of the Texas Gulf Coast area as if it were a single area for the purpose of "in-line" pricing is misleading.

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[23] Congress has provided that, on judicial review of an order of the Commission, "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," 15 U.S.C. 717r(b).

Moreover, the D. C. Circuit explicitly distinguished the case before it from the case-at-bar, as follows:

> "However, the Tenth Circuit was faced with a problem very different from ours. There, only 1.39% of the gas sold in the area was permanently certificated. * * * In our case there is a substantial volume moving under permanent certificates. We are not reviewing the FPC's method of determining an in-line price when there are no permanently certificated prices available for comparison" (Pet. No. 1135, App. p. 28a, footnotes omitted).

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

PHILLIP D. ENDOM
1608 Walnut Street
Philadelphia, Pennsylvania
19103

ROBERT E. MAY
FRANCIS H. CASKIN
MAY, SHANNON AND MORLEY
1700 K Street, N. W.
Washington, D. C. 20006

Attorneys for Sun Oil Company, Respondent

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APPENDIX A

I

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

STATEMENT OF GENERAL POLICY NO. 61-1

ESTABLISHMENT OF PRICE STANDARDS TO BE APPLIED IN DETERMINING THE ACCEPTABILITY OF INITIAL PRICE PROPOSALS AND INCREASED RATE FILINGS BY INDEPENDENT PRODUCERS OF NATURAL GAS

(Issued September 28, 1960)*

Before Commissioners: JEROME K. KUYKENDALL, *Chairman;* FREDERICK STUECK and ARTHUR KLINE.

This statement establishing rate standards for independent producers of natural gas is issued on our own motion and is based on our experience gained after six years of regulation of independent producers under the Natural Gas Act. By this statement and the appended area price schedules we will set standards for initial and increased rate filings by producers for the sale of natural gas into interstate commerce. These standards will serve as a guide to us and to interested parties in determining whether proposed initial rates should be certificated without a price condition and whether proposed rate changes should be accepted or suspended.

Since the Supreme Court's 1954 decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 674, holding that under the Natural Gas Act the Commission has jurisdiction over the interstate transportation and interstate sale for resale of natural gas by independent producers,

* Published in Federal Register, October 5, 1960 (25 F.R. 9578) and corrected, April 11, 1961 (26 F.R. 3066). Codified as 18 C.F.R. 2.56. Secretary's rejection of application for rehearing affirmed by order issued November 25, 1960. Amended by orders issued October 25, 1960, and December 20, 1960, 24 FPC 902, and 1107, respectively, and March 29, 1961, 25 FPC 595.

and that such producers are "natural-gas companies" under the Act, the Commission's regulatory task has increased enormously in size and difficulty. In contrast to the regulation of less than 200 pipeline companies prior to the *Phillips* case, under this decision Commission regulation extends to several thousand independent producers of natural gas. Although this producer segment of the natural gas industry differs from the pipeline transmission portion in fundamental particulars, its multiplicity of sales and services are now required to be covered by many thousands of rate and certificate filings under the Act.

This ever-growing volume of additional rate and certificate filings has placed an increasing burden not only on this Commission and other regulatory commissions, but on all those—consumers, producers, pipeline companies, and distributing companies as well—whose interests we must consider in administering the Act. It is essential, particularly in the interest of the consumer for whose protection the statute was enacted, that means be found for making the most effective use possible of the Commission's limited facilities in discharging the new and additional duties called for by the regulation of producers of natural gas. In our opinion, the price standards established by this statement will aid in effectively applying the provisions of the Act to independent producers on a simple, clear and administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation. Our many reasons for establishing these maximum acceptable rates as opposed to establishing rates based on a full cost-rate base hearing for every rate filing made by producers are set forth at considerable length in our opinion No. 338, *Phillips Petroleum Co.,* Docket No. G-1148, et al., pp. 542 thru 548, *ante,* issued on this date.

Some further explanation is required of certain aspects of these area rate levels. The geographical areas which we have used are convenient and well known. They are

not necessarily in complete accord with geographical and economic factors which may be relevant to the establishment of pricing areas. As experience and changing factors may indicate, we will change or alter these areas from time to time in order to eliminate such inequities as may appear to exist because of our use of geographical boundaries.

In arriving at the price levels for the various areas set forth in the appendix to this statement, we have considered all of the relevant facts available to us. Such consideration included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas. Of necessity, we have not set forth the adjustments to these prices which must be made to take into account every possible provision of every contract which may affect the actual price, such as Btu adjustments, conditions of delivery, etc. The relevance of such adjustments to the basic contract price and the appropriate established price standard must be considered as each filing is made. As it becomes apparent that certain adjustments have general applicability in a specific area, the area price standard will be revised and set forth in greater detail with regard to the exact sale conditions to which the rate applies. We should, however, make it clear that these present price standards apply to pipeline quality gas as that term is generally understood in each area and, except for the Louisiana prices, are inclusive of all taxes.

Two price standards are set for each area. Initial prices in new contracts are, and in many cases by virtue of economic factors, must be higher than the prices contained in old contracts. For this reason, we have found it advisable to adopt two schedules of prices, one pertaining to initial prices in new contracts and one pertaining to

escalated prices in existing contracts. It is anticipated that these differences in price levels will be reduced and eventually eliminated as subsequent experience brings about revisions in the prices in the various areas.

It will be noted that we have omitted listing an initial price level for sales from Southern Louisiana and Mississippi. The proper initial price level for these areas is currently the subject of two hearings pursuant to Supreme Court Decisions. *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378; *Public Service Commsision* v. *F.P.C.,* 361 U.S. 195, F.P.C. Docket Nos. G-11024, *et al.,* and G-13143, *et al.,* respectively. Clearly, in light of these cases, it would not be proper at this time for us to announce an initial rate level for these areas prior to a final determination of these cases.

These price levels, as announced by Appendix A attached to this statement, are for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level. As with the areas, the prices will be adjusted from time to time as such facts as may come before us compel such adjustments. For the present, and in the absence of compelling evidence calling for other action by us, proposed initial sales of natural gas by independent producers which include rates higher than those indicated in the appendix attached to this statement shall be denied a certificate or certificated only upon the condition that lower rates be filed, and all rate changes filed under existing contracts which call for a rate exceeding the indicated price level in the attached appendix to this statement shall be suspended.

Where a proposed price exceeds the indicated rate level and is therefore conditioned or suspended we will, in determining whether the higher price is justified, not necessarily consider only the financial requirements of the individual producer proposing the price but will consider

all of the above elements relevant to the industry generally in the area concerned. Similar evidence will also be required from purchasers or their customers who object to any of the price levels or any specific price. Our determination will be in the nature of setting a price for the gas itself from any source questioned and not necessarily a price applicable solely to the party proposing some other price. In this connection we urge that all parties who have any interest in changing an area price join in such a proceeding leading to a determination of a proper revision, if any, in an area price or in the geographical area itself. As there will undoubtedly be numerous parties with an interest in such a proceeding full use should be made of prehearing procedures to reduce the factual issues and consolidate factual presentations to eliminate repetition and duplication of evidence. Because of the impossibility of giving detailed instructions for every proceeding, the precise course of each hearing and the admissibility and relevant weight of each type of evidence must be determined as hearings proceed, and we expect to issue additional policy statements from time to time clarifying various aspects of these procedures and principles. The new area rate determinations resulting from such proceedings will represent final determinations of just rates for the areas involved as of the date of the decision and for prior periods.

Appendix A

(To Statement of General Policy No. 61-1)

Area price levels for natural gas sales by independent producers

[All rates at 14.65 Psia]

Area	Initial service rates per Mcf	Increased rates per Mcf
Texas:		
District No. 1	15 cents	14 cents.
District No. 2	18 cents	14 cents.
District No. 3	18 cents	14 cents.
District No. 4	18 cents	14 cents.
District No. 5	14 cents	14 cents.
District No. 6	15 cents	14 cents.
District No. 7-b	14 cents	11 cents.
District No. 7-c	16 cents	11 cents.
District No. 8	16 cents	11 cents.
District No. 9	14 cents	14 cents.
District No. 10	17 cents	11 cents.
Louisiana:		
Southern	Not determined	13.7 cents (14 cents at 15.025 psia).
Northern	16.6 cents (17 cents at 15.025 psia)	13.7 cents (14 cents at 15.025 psia).
Mississippi	Not determined	13.7 cents (14 cents at 15.025 psia).
Oklahoma:		
Panhandle area	17 cents	11 cents.
Other	15 cents	11 cents.
Carter-Knox	16.8 cents	11 cents
Kansas	16 cents	11 cents.
New Mexico:		
Permian Basin	16 cents	11 cents.
San Juan Basin	12.7 cents (13 cents at 15.025 psia)	12.7 cents (13 cents at 15.025 psia).
Colorado	14.6 cents (15 cents at 15.025 psia)	12.7 cents (13 cents at 15.025 psia).
Wyoming	15 cents	12.7 cents (13 cents at 15.025 psia).
West Virginia	26.8 cents (28 cents at 15.325 psia)	23.9 cents (25 cents at 15.325 psia).

II

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

FIFTH AMENDMENT TO STATEMENT OF GENERAL POLICY NO. 61-1

(Issued August 30, 1962)*

Before Commissioners: JOSEPH C. SWIDLER, *Chairman;* HOWARD MORGAN, L. J. O'CONNOR, JR., CHARLES R. ROSS, and HAROLD C. WOODWARD.

The Commission's Statement of General Policy No. 61-1 issued September 28, 1960, 24 FPC 818, announced a price level of 18¢ per Mcf for initial sales in Texas District No. 4 (at 14.65 psia). The Statement of Policy specified that the price levels announced therein were to be "adjusted from time to time as such facts as may come before us compel such adjustments." The price level previously announced for Southern Louisiana was in fact adjusted by the Fourth Amendment to the Statement of General Policy on October 31, 1961.

The Commission in its opinion in the *Skelly* case issued this date has had occasion to re-examine the question of the in-line price in Texas District No. 4 immediately prior to September 28, 1960, in light of the subsequent court decisions dealing with the initial pricing question in producer certificate cases.

We have also reviewed the sales in District No. 4 subsequent to September 28, 1960. We have carefully re-examined the appropriate level of initial ceilings in this district in light of present conditions in the area giving due

* Published in Federal Register on September 7, 1962 (27 F.R. 8918).

consideration to the applicable court decisions and the factors set forth in our original statement of policy.[1]

Just as was the case in our revision of the ceiling price in South Louisiana, our guiding purpose here is to arrive at a revised price which will enable the Commission to hold the line on new sales in this area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas. We conclude that, effective this date, the ceiling price level for initial sales in Texas District No. 4, inclusive of state taxes, shall be 16 cents per Mcf (at 14.65 psia).

Commissioners Morgan and Ross *dissenting* and filed separate statements.

MORGAN, Commissioner, *dissenting:*

The Supreme Court, in the Hope case,[1] declared that "the fixing of just and reasonable prices was the heart of the new regulatory system" encompassed by the Natural Gas Act.

The Court also observed that:

> In passing on such applications for certificates of convenience and necessity the Commission was told by § 7(c), as originally enacted, that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate consumption * * *

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[1] We there stated that these "included cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas."

[1] *Federal Power Commission, et al.* v. *Hope Natural Gas Co.*, 320 U.S. 591 at 611 (1944).

at the *lowest possible* reasonable rate consistent with the maintenance of adequate service in the public interest." (Italics supplied.)

Fifteen years later, in the now famous CATCO case,[2] the Court not only found it necessary to repeat both admonitions but, with respect to its reference to the "lowest possible reasonable rate", offered the following comments in the form of a footnote:

> The 1942 amendments to § 7, 56 Stat. 83, were not intended to change this declaration of purpose. See Hearings, House Interstate and Foreign Commerce Committee, on H.R. 5249, 77th Cong., 1st Sess. 18-19; H.R. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong., 2d Sess.

In CATCO the court placed a continuing responsibility on us, in certificating procedures, to prevent "out of line" prices and to "hold the line awaiting adjudication of a just and reasonable rate."

Under the terms of our Statement of General Policy No. 61-1,[3] we have been attempting to carry out our responsibilities through the device of so-called area prices—a currently fashionable synonym for what used to be called "fair field prices." As the majority has noted, the Statement of Policy contemplates another continuing responsibility on our part: to adjust the various area price levels "from time to time as such facts as may come before us compel such adjustments."[4]

Here we are faced with the necessity to act under the quoted portion of our own policy statement. Needless to

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[2] *Atlantic Refining Co., et al.* v. *Public Service Commission of New York, et al.*, 360 U.S. 378 at 388 (1959).

[3] Issued September 28, 1960, 24 FPC 818.

[4] 24 FPC at 820.

say, whatever action we take must also satisfy both the purpose of the Natural Gas Act and the mandates of the Supreme Court.

I maintain that the majority's action herein falls significantly short of satisfying either.

The action of the majority is, of course, an attempt to carry out the Commission's responsibility to adjust prices "from time to time as such facts as may come before us compel such adjustments." What are those facts? They are the facts exposed in the record and in the Commission's files during the course of the *Skelly* case.[5] Those facts demonstrated incontrovertibly that an in-line ceiling price in Texas Railroad District 4 prior to issuance of the Policy Statement could be no higher than 15¢, rather than the 18¢ promulgated by the then members of the Commission in their Policy Statement. That demonstration in *Skelly* compelled us—unanimously—to reduce prices contained in contracts executed in District 4 prior to September 28, 1960 (the effective date of the Policy Statement) to a maximum of 15¢ per Mcf. Unfortunately, because of errors for which the present Commissioners are in no wise responsible, this reduction was not made retroactive.

Exposure of those same facts now compels us to adjust the interim area ceiling price in Railroad District 4 as contemplated by the Policy Statement. But here we are not unanimous. The majority, after agreeing that 15¢ was the proper in-line maximum price in Texas Railroad District 4 up to 11:59 p.m., September 27, 1960, now has decided that as of 12:01 a.m., September 28, 1960, the in-line price was—and is—16¢ per Mcf. Explanation for

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[5] Opinion No. 362 *Skelly Oil Company*, Docket No. G-18638, *et al.*, 28 FPC 401. *Skelly* is a most important case in the brief and turbulent history of area pricing, concerning which I shall have a great deal more to say in a dissent to the decision in that case which, at this date, is still to be written.

this one-cent escalation, representing a 6⅔% increase in the "in-line" price of gas, is notable by its complete absence.

Does establishment of a 16¢ ceiling price comply with the Supreme Court's instruction to "hold the line awaiting adjudication of a just and reasonable rate"?

Is this "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest," as required by "applicable court decisions"?

The majority claims to have given "due consideration" not only to "applicable court decisions" but to other factors, including:

> * * * cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas.

I participated fully in all Commission discussions of *Skelly* and related matters, including the Commission meeting at which we took affirmative action on this case. I do not recall any discussion or consideration of this matter as extensive as that inferred by the majority's claim. I certainly recall no demonstration that 16¢ is "the lowest possible reasonable rate." On the contrary, the few work-papers considered by us demonstrated to my satisfaction that 16¢ is a higher price than is necessary to meet the standards of reasonableness and adequacy erected by the Court.

I maintain that the facts exposed in *Skelly*, viewed in the light of the Natural Gas Act, CATCO, and the prohibitions laid down by the Ninth Circuit[6] against our using

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[6] *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, *cert. den.* 365 U.S. 881.

"suspect" and "tainted" prices, compel us to adopt an interim price for Railroad District 4 no higher than 15¢ per Mcf.

Skelly demonstrated not only that any price higher than 15¢ per Mcf was "out of line" prior to September 28, 1960, but that the Commission itself was "out of line" when it established an 18¢ price to take effect on that date. Here we have rightly eliminated that wrongful price, but the majority declines to "hold the line awaiting adjudication of a just and reasonable rate" and insists on a price higher than 15¢ for the period after September 28, 1960.

I am not averse to establishing a price other than 15¢—either higher or lower—if it is first shown to be "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." No such showing—indeed, no showing of any kind—has been made in behalf of a price of 16¢. I therefore dissent.

Ross, Commissioner, ***dissenting:***

Setting or changing an interim guide line price without the benefit of notice, hearing and record but guided by the Commission's expertise, represents one of the most solemn obligations any administrative body can perform. See my dissent in *Skelly Oil Company, et al.*, Docket No. G-18638, et al.

Justice Frankfurter in his dissent in *F.P.C.* v. *Hope Natural Gas Company*, 320 U.S. 591, page 626, discusses the role of the Commission's expertise in natural gas regulations, as follows:

> Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the ele-

ments of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety * * *. It will not do to say that it must be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment.

The majority, in its expertise, states that 16¢ is the proper ceiling price level for sales in Texas R.R. District No. 4. The *Skelly* case, itself, reveals the prior 18¢ level as an example of a "glaringly bad prophecy" of a proper rate set by "the unguided discretion of the Commission." Is this new rate any better? What are the expressed reasons for this judgment? The majority, as one of the factors bearing on the ultimate price, state that they have reviewed the sales in District No. 4 subsequent to September 28, 1960. Thus, as I pointed out in my dissent, an improper price, in and of itself, becomes justification in a reappraisal of the appropriateness of the price upon challenge. This is circular reasoning if I ever saw any. This will be the principal defense adopted in the new proceeding ordered in Skelly.

The evil inherent in adopting an interim guide line price is the failure to set a standard upon which the Commission measured the price. It is all well and good to set forth a number of factors such as "cost information from decided and pending cases, existing and historical price structures, volumes of production, trends in production * * *" but the important matter is what is used in practice. Or, in the language of CATCO, what is in-lineness? Because of the possibility that interim guide line prices will remain in effect for substantial periods of time, changed only by decree and without notice, hearing and record and because such prices, particularly in new certificate cases have a tendency to become floors rather than the "maximum ac-

ceptable rates",[1] it is essential for the preservation of the administrative process to set forth the standards used.

It is easy to say what in-lineness does not mean. It certainly shouldn't mean comparing the highest heretofore certificated price in the area, see *Panhandle Eastern Pipe Line Co., et al.,* Docket No. CP60-103, *et al.,* nor should it mean a price higher than the majority of the prices, see *Continental Oil Co., et al.,* Docket No. G-11024, *et al.* In fact, one may not compare the proposed price with those that are at all clouded or suspect.[2]

I have great doubt, too, whether in-lineness should be based only on new sales. First, prices under the old contracts represent informed industry judgment as to the level of prices which are acceptable to them. Second, the bulk of the gas is supplied under old contracts. Third, it is not necessarily true that the bulk of the costs were incurred in the year of certification. Fourth, I have not as yet seen any factual evidence to indicate that the current costs of finding and developing gas are significantly higher than in 1960.

Nor should in-lineness be based upon sales made by an affiliate to its parent pipeline. Nor should in-lineness be based upon sales made to a new pipeline desperate for sources of gas, or to a pipeline, which has allowed its supply to become unreasonably low. In-lineness should also not be measured by prices that a pipeline might pay to keep another pipeline out of a field so it may monopolize the area. Nor should in-lineness mean prices based upon the desire or need of a pipeline for auxiliary products such as butane, propane or helium. Nor should in-lineness mean prices paid by a pipeline who has a monopoly in its service area or a pipeline which affiliates have gas purchase ad-

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[1] *Statement of General Policy No. 61-1,* p. 819.

[2] *United Gas Improvement Co.* v. *F.P.C.,* 283 F. 2d 817, *cert. den.* 365 U.S. 881.

justment clauses. Certainly, in-lineness should not be based upon prices paid by a pipeline engaged in the production business in the area to other independents.

Looking at in-lineness from another standpoint, it should not be based upon a distress sale by a producer to a pipeline when the pipeline can force an unconscionably low price on said producer. Also, sales by a producer of low volumes or sales from wells with poor deliverability should not be a measure. In fact, any case where the elements of fair play are not present should not be used to measure in-lineness. Thus, where any or all of the above enumerated factors are present, it is incumbent upon this Commission to gage their impact, and properly to discount their effects.

It is apparent, therefore, that proper in-lineness means the prices that prudent utility pipeline companies, acting in effect as agents for natural gas distribution companies which compete in a true energy market, would pay to financially responsible and informed producers in attempting to gain for the distribution companies the benefits they could obtain for themselves if they were able to bargain directly with those producers. Such prices will, of course, vary from time to time depending upon economic conditions both in the field and in the end market. The ultimate determination of an in-line price certainly should not be among the highest untainted heretofore certificated prices, for the reasons advanced in detail above, but rather should be based on the bulk line average of existing prices, since these are the only ones which reflect the economic conditions in the field, the end market, and the specific conditions applicable to the pipeline intermediary.

On the basis of the evidence presented here, and particularly in view of the lack thereof, and on the basis of evidence presented in the *Skelly* case, I would find the proper in-line price for District No. 4 as 15¢.

Woodward, *Commissioner:* I join in and adopt the dissenting opinion of Commissioner O'Connor filed herein.

APPENDIX B

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

AMERADA PETROLEUM CORPORATION, ET AL.,

DOCKET No. CI62-1544, ET AL.

ORDER DENYING MOTION TO IMPOSE PRICE CONDITIONS IN TEMPORARY CERTIFICATES

(Issued February 5, 1963)

Before Commissioners: JOSEPH C. SWIDLER, *Chairman;* HOWARD MORGAN, L. J. O'CONNOR, JR., CHARLES R. ROSS, and HAROLD C. WOODWARD.

On November 29, 1962, the Long Island Lighting Company, Philadelphia Electric Company and The United Gas Improvement Company (Movants) filed a motion requesting that the Commission vacate the temporary certificates issued to the various party-applicants to the above-entitled proceeding or, in the alternative, impose a condition in each of these temporaries, requiring that the applicant refund to the purchaser, with interest at 7% per annum, any amounts hereafter collected which may be determined to be in excess of the price required by the public convenience and necessity under each applicant's respective certificate docket.

Each of the producers herein except Sun Oil Company in Docket No. CI62-276 have been granted temporary authority to make sales in interstate commerce. In almost every instance the authority was granted without condition as to refund to a price below that at which the sale would be initiated. The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. Sales of gas were commenced by each of the producers pursuant to and in reliance upon the temporary authority.

Essentially the motion constitutes an application for rehearing of the Commission's Letter Orders issuing tem-

porary authorizations to certain of the producers herein. Section 19(a) of the Natural Gas Act provides that an application for rehearing must be submitted within 30 days following the issuance of an order. The motion herein was not submitted within the statutory 30-day period following the issuance of the temporary authorizations. There is no question that such temporary authorizations constitute appealable orders and, therefore rehearing should be sought within 30 days. However, we recognize that the letter orders issuing the authorizations were unreported, although copies thereof, were available to the public. We shall not, therefore, dismiss the motion as being untimely. However, for the reasons hereinafter set forth, we must deny the motion to terminate the existing temporary authorizations.

Section 7(c) of the Natural Gas Act empowers the Commission to issue temporary certificates when emergency situations exist. We have promulgated regulations recognizing certain situations which constitute emergency situations as to independent producers. See regulations under the Natural Gas Act, Section 157.28.[1] Each of the producers who requested the issuance of temporary authorization to sell gas set forth an emergency situation which, under our regulations, permitted the issuance of such authority. Temporary certificates were therefore issued. Movants would now have us withdraw the existing authority and proffer to each producer a new temporary certificate conditioned to meet the requested requirements, giving each producer the opportunity to reject such temporary authority. Movants ignore the fact that the producers and pipelines here involved have already acted upon the temporary autherizations as issued and have

[1] Also see order denying applications of New York Commission for rehearing and reconsideration and motion for a stay issued December 31, 1962, in *J. Ray McDermott, et al.*, Docket No. CI63-301, *et. al.*

undoubtedly expended considerable funds in justifiable reliance thereon. Apparenlty Movants have also ignored the dependence of pipelines and their customers upon continued service once a reservoir of natural gas begins flowing into interstate lines. To now offer the producers an opportunity to reject a substituted temporary certificate, conditioned to provide for refunds down to the price to be fixed after Section 7 hearing we have ordered, would clearly be contrary to the public interest. It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas.

Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. This we will not do. Assuming, without deciding, that we have authority to impose such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with "such certainty as to allow the exercise of choice upon [the producers'] part." Sunray *Mid-Continent Oil Com-*

pany v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy.

While this case relates to the imposition of refund conditions in temporary authorizations already issued, we do not wish our determination here to be construed as indicating that we will normally impose such a condition if the applications for temporary authority were before us for the first time. On the contrary, as we made clear in our order in *J. Ray McDermott, supra,* in granting temporary authorizations at our area ceiling prices for producers to sell gas, pending the conclusion of the statutory hearing on the permanent certificate, we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of the natural gas companies and the public generally) by providing that while the temporary certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate. Our policy in this respect was clearly set forth in the Fourth Amendment to our Statement of General Policy No. 61-1 in which we reduced the Southern Louisiana ceiling and observed that the Commission's interim ceilings represent the Commission's judgment of a ceiling which "will enable the Commission to hold the line on new sales in the area at a level consistent with the public interest and, at the same time, to enable producers to obtain authorizations which provide them a reasonable basis for proceeding with their operations and furnishing needed supplies of gas."

In view of these circumstances we find it would be contrary to the public interest, as well as inequitable, to condition the temporary certificates issued to the above-mentioned producers as requested by Movants.

The Commission orders:

The request made by the Long Island Lighting Company, Philadelphia Electric Company and the United Gas Improvement Company either to have the temporary certificates issued to the party applicants to the above-styled proceedings vacated or, in the alternative for the imposition of a condition in each of these temporaries be and hereby is denied.

Commissioners Morgan and Ross *concurring,* filed separate statements appended hereto.

MORGAN, *Commissioner,* concurring:

I concur only in the result.

Unfortunately, past indiscretions committed by this Commission in the matter of granting temporary certificates do not permit us now, in good grace, summarily to grant relief sought by the consuming public.

I therefore limit myself to the hope that proceedings on the merits of this matter will soon be concluded; and that the rates in question will be adjusted, where necessary, to correspond to the "lowest possible reasonable rate" required by the Act.[1]

I do not concur with the reasoning of the majority statement. It appears to be based on what the majority hopes it would find if a hearing were held on the subject motion. Specifically, we should not allow an institutional guilt complex regarding the improprieties that have attended past issuance and use of Section 7 temporary certificates to warp our present understanding of the true legal character of that device.[2]

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[1] *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378 at 388 (1959).

[2] See our previous understanding on this point as set forth at page 110 of Opinion No. 351, issued January 22, 1962, 27 FPC 96.

The concurring statement of Commissioner Ross fully reflects my views in this matter.

Ross, *Commissioner*, concurring:

I concur with the action of my colleagues in denying the instant motion. This separate statement is necessitated by the failure of the majority to take this occasion to remind industry of the true nature and legal character of temporaries in view of the abuses which have occurred in this area.

Since the earliest days of producer regulation, temporary authorizations permitting the interstate sale of gas have been granted in emergency situations in which expeditious action was required. This practice rapidly expanded to situations where the "emergency" was not particularly acute. Once granted by the Commission and accepted by the producer, the terms of the temporaries were rarely—if ever modified. Temporary authorization quickly became the mode of producer regulation under Section 7 of the Natural Gas Act, and this situation persists today.[1]

Producers began to view the temporary authorizations as the final word regarding the terms under which their sales would be made, and the Commission took no direct action which could be construed as being inconsistent with this belief. The oppositions to the instant motion, for example, mirror the producers' attitude that a temporary authorization, once accepted, represents virtually an unchallengeable and immutable right to sell gas under the terms of the temporary.

In view of this history, I do not consider it desirable to amend the authorizations here in question. However, I can find no justification for reinforcing the fictitious claim that

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[1] In my partial dissent in *Tenneco Oil Co.*, Docket No. CI63-334, *et al.*, I noted that of 2880 temporary certificates granted in the last two years, only 31 had been superseded by permanent certificates.

a temporary somehow acquires an aspect of permanence—a notion which is legally unsound, and one which involves the possibility that excessive prices will receive continued sanction resulting in unjust enrichment to the producers.

Temporary authorizations are supposedly granted in emergency situations in order to avoid the delay involved in a detailed inquiry. They are granted summarily, without notice of hearing. As such, they represent a concession to producers to the possible detriment of their purchasers. While an application for rehearing may be filed (the producers even would have us reject this), this hardly measures up to our traditional concept of justice, which assumes that interested parties will have a right to state their positions before—not after—decision is made.[2] It is crystal clear to me, as it was to this Commission twelve months ago, that temporary authorizations are subject to change on the same basis as that on which they are granted. In the remanded CATCO case, this Commission held:

> Under Section 7(c) the Commission may issue a temporary certificate in case of emergency pending the determination of an application for certificate. This appears to contemplate a continuous course of adjustment until the time that a final order determines that conditions under which a permanent certificate shall be issued. [*Continental Oil Company, et al.*, Docket No. G-11024, *et al.*, Opinion No. 351, 27 FPC 96 at p. 110]

I can find no justification for joining the majority in its purported retreat on this point. Rather than retreat, the

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[2] An essential element of due process is an opportunity to be heard before the reaching of a judgment. Judgment without an opportunity to be heard is judicial oppression. *WJR, The Goodwill Station, Inc.* v. *F.C.C.*, 174 F. 2d 226, 233 (1948) citing the principal found in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581 (Webster's argument) (1819), and in *Gaplin* v. *Page*, 18 Wall. 350, 368 (1873).

instant motion presents an excellent opportunity for us to emphasize the essentially transient nature of temporaries, consistent with our holding in *CATCO, supra.*

The necessity for firmly adopting such a policy is manifest. Only five months ago, we found the in-line price in Texas Railroad District No. 4 to be 15¢, at least as of September 28, 1960.[8] It is difficult to conceive that the in-line price with respect to the contracts here involved has escalated since that time to 18¢, an increase of 20 percent. Yet the majority closes its eyes to this significant determination, and not only denies the relief requested, but goes further and voices its determination to perpetuate the conditions under which excessively high prices will be charges again and again without providing for recoupment down to the proper level. Fearing that its action might be misconstrued, the majority, in what is clearly dicta on page 220, indicates that it will not normally impose refund conditions in initial temporary authorizations at the ceiling price levels.

In my opinion, there is no rational basis for such a position. For one thing, it is obvious that all of the reasons cited in the majority's order for refusing to impose the requested refund conditions are clearly inapplicable to situations in which we would be considering an initial application for temporary authorization. The majority's apparent rationale for this position is found in its statement that it balances the competing interests of industry and the consumer by limiting temporary authorizations to prices established in the Statement of General Policy, and by providing for no rate increases during the term of temporary authorization. However, the prospect of limiting producer prices to the applicable ceiling is small consolation to the consumer when he is convinced—and with justification—that several of the ceilings are unjustifiably high.

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[8] *Skelly Oil Co.*, Docket No. G-18638, *et al.*, Opinion No. 362, 28 FPC 401 (issued August 30, 1962).

In summary, I am compelled to voice my disagreement with the majority's apparent insistence to regulate producer prices, in the important interim period pending the establishment of just and reasonable rates, by means of temporary authorizations, and on as summary a basis as possible. In my opinion, initial prices of producers should be governed by permanent certificates. To the extent that temporaries are granted, they should be subject to change on an *ex parte* basis, particularly when it is evident that the price is either too high or too low.